92-904

No.

Supreme Court, U.S.
FILED
NOV 25 1992
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

October Term 1992

CHARLES I. McCOY AND SEAVAC INTERNATIONAL, INC.-USA

Petitioners,

v.

SEAWARD MARINE SERVICES, INC.

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, in a case brought pursuant to the *qui tam* provisions of the False Claims Act, the United States and private relators are bound by the contract interpretations of a Government employee who lacks authority to contract on behalf of the United States?

2. Whether a court, in reviewing the evidence on a motion for judgment as a matter of law, should review all of the evidence, only the evidence which is favorable to the nonmoving party, or evidence which is undisputed and unfavorable to the nonmoving party?

PARTIES TO THE PROCEEDING

The parties to this proceeding were the sole parties to the proceeding below, which was captioned *United States of America ex rel. Charles I. McCoy and Seavac International, Inc.-USA v. Seaward Marine Services, Inc.* Petitioner Charles I. McCoy was a former supervisory employee of the respondent Seaward Marine Services, Inc. Petitioner Seavac International, Inc.-USA is a private underwater hull cleaning contractor. For over ten years, the respondent, Seaward Marine Services, Inc. (''Seaward''), has been the exclusive contractor for worldwide cleaning of the underwater hulls of United States Navy ships. Petitioner Seavac International, Inc.-USA is not a parent, subsidiary, or affiliate of any corporation or public entity. Respondent Seaward Marine Services, Inc. previously certified to the Court of Appeals below that it is not a parent, subsidiary, or affiliate of any publicly held corporation, or other publicly held entity.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Petitioners Charles I. McCoy and Seavac International, Inc.-USA ("Relators") respectfully pray that a writ of certiorari issue to review a decision of the United States Court of Appeals for the Fourth Circuit, which was entered on August 3, 1992.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is unpublished. The disposition of the Court of Appeals, affirming the judgment of the United States District Court for the Eastern District of Virginia, is reported at 972 F.2d 344 (Table), and was entered on August 3, 1992 (Ap-

pendix ("App.") at 1a). The decision of the District Court was entered on May 23, 1991 (App. at 10a). The jury verdict and initial judgment of the District Court was entered on April 3, 1991 (App. at 27a).

STATEMENT OF JURISDICTION

Relators brought a *qui tam* False Claims Act complaint in the United States District Court for the Eastern District of Virginia, pursuant to 31 U.S.C. §§ 3729 through 3733. The jurisdiction of the District Court was founded on a federal question, pursuant to 28 U.S.C. § 1331. A jury returned a verdict on April 3, 1991, finding Seaward had knowingly presented 886 false claims to the Navy, resulting in $763,620 in damages, which were trebled under the provisions of the Act. Judgment was entered in the amount of $2,290,860. On May 23, 1991, while a motion was pending for the imposition of $8,860,000 in statutory civil penalties, the District Court set aside the jury's verdict and granted judgment as a matter of law in favor of Seaward, and conditionally granted a new trial. Relators pursued a timely appeal under 28 U.S.C. § 1291.

The judgment of the Court of Appeals, for which review is now sought, was entered on August 3, 1992, affirming the District Court's entry of judgment as a matter of law (App. at 1a). On August 31, 1992, an Order was entered denying a timely petition for rehearing (App. at 31a). The jurisdiction of this Court is now invoked under 28 U.S.C. § 1254(1).

RELEVANT FEDERAL STATUTES AND REGULATIONS

The False Claims Act, 31 U.S.C. § 3729(a) and (b):

False claims.

(a) **Liability for certain acts.** — Any person who —

(1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval;

(2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government;

* * *

is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person. . . .

(b) **Knowing and knowingly defined.** — For purposes of this section, the terms "knowing" and "knowingly" mean that a person, with respect to information —

(1) has actual knowledge of the information;

(2) acts in deliberate ignorance of the truth or falsity of the information; or

(3) acts in reckless disregard of the truth or falsity of the information,

and no proof of specific intent to defraud is required.

Federal Acquisition Regulations, 48 C.F.R. §§ 1.601, 1.602, 2.000 and 2.101 (App. at 32a).

STATEMENT OF THE CASE

For more than ten years, under the terms of a series of consecutive, fixed-price, indefinite quantity service contracts, Seaward has been the exclusive Government contractor for the underwater cleaning of the hulls and propellers on United States Navy ships. Two of these contracts, executed in 1984 and 1989, are the subject of this *qui tam* False Claims Act action. Under these two contracts, Seaward billed the Navy for hundreds of false claims for per diem and mobilization/demobilization ("mob/demob"). Based on evidence that Seaward had presented hundreds of false claims to the United States Navy, Relators filed this action under the False Claims Act, 31 U.S.C. §§ 3729 through 3733.

Throughout the performance of the contracts, Seaward's billing procedure successfully eluded the overview of the Navy's Contracting Officer, who testified he was never asked to interpret the per diem or mob/demob reimbursement provisions of the contracts. No person at Seaward or in the Navy ever sought the opinion of the Contracting Officer regarding the proper interpretation of the contracts. The Contracting Officer never delegated to any person the authority to bind the Government contractually. As a result, the Contracting Officer was the only person authorized to bind the Government to an enforceable contract interpretation.

Seaward, at trial, claimed that Seaward's and the Navy's construction of the contracts was controlling. Seaward claimed that the Navy and Seaward shared a "practical interpretation" of the contracts throughout the period of Seaward's performance. However, the testimony of the Contracting Officer failed to support Seaward's "practical interpretation" defense.

As a result, Seaward was forced to rely at trial upon the personal *post hoc* contract interpretation of Michael Dean.

Dean, a civilian project manager in the Navy's Underwater Ship Husbandry Division, admitted in testimony that he lacked the authority to bind the Government. Dean also admitted that his interpretations at trial were his own, and were not based upon any determination or finding by the Contracting Officer. Furthermore, Seaward's President admitted that Dean's interpretations were only solicited by Seaward after the Relators' False Claims Act complaint was unsealed by the District Court.

Seaward operated the Navy contracts under a set of policies and interpretations which were at variance with Seaward's testimony and interpretations at trial. With respect to Seaward's East Coast operations, the contracts required Seaward to maintain a base of operations in Norfolk, Virginia. To provide services under the contracts, Seaward maintained several permanent diving crews whose areas of operations coincided with those of the Navy. The contracts obligated the Navy to reimburse Seaward for the per diem expenses of its divers "incurred after arrival at and prior to departure from a . . . remote worksite. . . ." The contracts also provided that the "limitations applicable to subsistence will be in accordance with the Joint Travel Regulations [("JTRs")] for Department of Defense civilian employees."

Seaward paid per diem to its Florida divers for work performed within a commuting distance of the divers' homes. Seaward and Dean claimed at trial that the contracts unambiguously incorporated only the monetary ceilings imposed by the JTRs, and that other substantive limitations of the JTRs did not apply.

However, a diver who was formerly employed by Seaward in Florida testified at trial that Seaward had refused to pay him per diem for work he performed under the contracts, near his Florida home. A supervisor for Seaward informed this diver

that it was against Seaward's policies for the supervisor to pay any Florida diver per diem for work performed near his Florida home, unless the diver altered his employment records and supplied Seaward with a false residential address — even a post office box number — within commuting distance of Seaward's Norfolk offices. No evidence was presented to rebut the testimony of the former diver regarding Seaward's post office box scheme.

The testimony of Seaward's former diver established that Seaward knowingly attempted to circumvent the prohibition in the JTRs against paying per diem for work performed near an employee's home. The testimony also directly contradicted the assertions of Seaward's President that Seaward paid per diem regardless of an employee's residence. Seaward's testimony was supported by Dean.

The Court of Appeals concluded that Dean spoke for the Navy, and that the Relators were, therefore, bound by Dean's construction of the per diem provisions of the contracts. No evidence was otherwise presented to establish that the Navy's Contracting Officer, or any other agent with authority, agreed with Seaward's and Dean's contract interpretations at trial.

The jury resolved the conflict in the testimony and found that Seaward knowingly submitted 448 false claims to the Navy for reimbursement of per diem paid to Seaward's divers who lived and worked in Florida.

Regarding the Government's reimbursement of Seaward's mob/demob expenses, the contracts required the Navy to reimburse Seaward for its expenses incurred "to move the equipment and crew to and from work locations (outside of the normal base of operations). . . ." The contracts further provided that mob/demob charges may not be incurred "simultaneously" with per diem charges, and neither mob/demob nor per diem expenses could be paid in Norfolk.

Relators argued that Seaward knowingly and falsely billed the Navy for mob/demob and per diem for 92 return trips to Norfolk. Relators based their claims on the contracts' prohibition that mob/demob did not apply to Norfolk, and on the provision that mob/demob and per diem were restricted to work locations outside the base of operations in Norfolk. The evidence established mob/demob was intended to pay for the same expenses which were reimbursed under per diem. The Navy's reimbursement of both mob/demob and per diem, therefore, amounted to a windfall.

Seaward's President testified that Seaward knew that it billed the Navy for mob/demob and per diem in the 92 return trips to Norfolk. He also testified that he knew that billing the Navy for demobilization charges and per diem for return trips to Norfolk was inconsistent with the contracts. Seaward's President also testified that Dean agreed with Seaward's construction of the contracts. The testimony of Seaward's President demonstrated that Seaward had actual knowledge that the contracts did not permit Seaward to bill the Navy for per diem and subsistence for the 92 return trips to Norfolk. The testimony of Seaward's President also established that Seaward knew it could not bill the Navy for any charges relating to mob/demob, if those expenses were incurred on the same day for which per diem reimbursement was sought. Moreover, Seaward's President testified that Seaward billed the Government for mob/demob incurred on the same day.[1]

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[1]A complete reading of the testimony of Seaward's President indicates that significant portions of his testimony changed under later cross-examination. However, Seaward's President never changed his admission that the contracts prohibited the reimbursement of the 92 return trips to Norfolk.

Relators established, and the jury found, through testimony and evidentiary summaries that Seaward presented a total of 438 false claims to the Navy for mob/demob expenses incurred on the same day as per diem, including the 92 return trips to Norfolk.[2]

On each of the counts under the False Claims Act, the panel below made a *de novo* finding of fact and a conclusion of law. As to Seaward's per diem mischarging, the Fourth Circuit found that the testimony from Seaward's former diver regarding Seaward's fraudulent post office box scheme was "the action of a single supervisor in one instance" and that it "did not amount to a course of conduct" (App. at 9a n.5). The Court of Appeals also found that a "comprehensive reading" of the testimony of Seaward's President "allows only one construction, *i.e.*, that [Seaward] interpreted the Contracts to permit same day charges and per diem reimbursement for divers residing near the remote sites" (App. at 9a n.5). The Court of Appeals concluded that the 92 claims for return trips to Seaward's Norfolk base of operations were not false because

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[2]The Court of Appeals ruled *de novo* that Relators' evidentiary summaries were inadmissible. The Fourth Circuit made no finding of clear error or abuse of discretion by the District Court. Relators compiled their evidentiary summaries of Seaward's mob/demob claims based upon information contained in Seaward's vouchers and cost summary forms. This information was cross-checked with entries in Seaward's expense vouchers and cost accounting calendars. The summaries demonstrated that Seaward billed the Navy for mob/demob and per diem for each of the 438 claims determined by the jury to be false. Dean and Seaward's own accounting clerk testified that the Relators' methodology for compiling the summaries would result in a very accurate picture of when the diving crews moved between remote work sites, and that the dates could be obtained, as Relators did, solely from Seaward's vouchers and cost summary reports. Nevertheless, the Court of Appeals ruled that the "only basis for the Relator's assertion that the per diem and mob/demob were paid while the crew was in Norfolk was informal calendar entries prepared by a Seaward clerk. The only testimony concerning the meaning of these entries was given by that clerk." (App. at 9a n6.)

"Relators presented no evidence that the ninety-two claims were any different from the other claims in which mob/demob and per diem were paid on the same day" for trips between remote work sites (App. at 9a n.6).

The Court of Appeals expressly accepted Seaward's "practical interpretation" defense. Principally relying upon the testimony of Dean, and without holding that Dean had the authority to bind the Government, the Court of Appeals concluded that Seaward's and Dean's contract interpretations were consistent. The Court of Appeals concluded that "[i]f both the contractor and the government interpret the contract one way throughout the contract's history, it is unthinkable that the contractor's billings which follow this common interpretation could constitute a false claim" (App. at 8a). Apparently, since Seaward's interpretation at trial was consistent with Dean's personal construction of the contracts, the Court of Appeals affirmed the entry of judgment as a matter of law on the basis that the Relators failed to establish that Seaward "knowingly" submitted a false claim.

REASONS FOR GRANTING THE WRIT

I. THIS COURT MUST DECIDE THE IMPORTANT FEDERAL QUESTION OF WHETHER THE DOCTRINE OF "PRACTICAL INTERPRETATION" MAY BE ASSERTED AS A DEFENSE AGAINST THE UNITED STATES IN A FALSE CLAIMS ACTION

The Fourth Circuit's panel opinion impermissibly extends to Federal contract law the equitable doctrine that courts should not disturb the "practical interpretation" of the parties to a contract. The seminal decision from this Court, from which the defense derives in the Federal court system, is *Old*

Colony Trust Co. v. Omaha, 230 U.S. 100 (1913).[3] In *Old Colony Trust*, this Court stated that "[g]enerally speaking, the practical interpretation of a contract by the parties to it for any considerable period of time before it comes to be the subject of controversy is deemed of great, if not controlling, influence." *Id.*, 230 U.S. at 118.

However, the doctrine of "practical interpretation" is derived from state contract law in which equitable principles are applied as defenses to contract disputes. *Old Colony Trust*, 230 U.S. at 118. The Supreme Court acknowledged in *Old Colony Trust* that the "state [of Nebraska], like individuals, may be estopped by its act, conduct, silence, and acquiescence." *Old Colony Trust*, 230 U.S. at 119. In the case *sub judice*, the considerable body of Federal common law — not the equitable principles of state law expressed in *Old Colony Trust* — controls the construction of contracts to which the Federal Government is a party. *Clearfield Trust Co. v. United States*, 318 U.S. 363, 366-67 (1943); *Forman v. United States*, 767 F.2d 875, 879-80 (Fed. Cir. 1985).

The Fourth Circuit's opinion in this case relied upon *Management Systems Associates, Inc. v. McDonnell Douglas Corp.*, 762 F.2d 1161, 1172 (4th Cir. 1985) (quoting *Old Colony Trust*, 230 U.S. at 118). However, the Fourth Circuit failed to cite any Federal contract case authority in which the principle has

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[3]Seaward failed to establish the necessary elements to the defense of "practical interpretation," even if such doctrine is applicable in disputes involving the interpretation of Federal contracts. The "practical interpretation" upon which Seaward and the unauthorized Navy personnel agreed was not devised until after this False Claims Act controversy arose. Seaward and Dean did not discuss their "mutual" interpretations until after the Relators' complaint was unsealed. Yet, the mutual contract interpretation upon which a party relies must have existed "for any considerable period of time ***before*** it comes to be the subject of controversy. . . . " *Old Colony Trust*, 230 U.S. at 118 (emphasis added).

been applied against the Government in a contract dispute. *Cf. Central Engineering & Construction Co. v. United States*, 59 F. Supp. 553, 565 (Ct. Cl. 1945) (citing *Old Colony Trust*) (court followed the contract interpretations of the parties where the Contracting Officer and the head of the agency agreed with the contractor's interpretation).

The Fourth Circuit's opinion, without embracing equitable estoppel, is just another variation of the "rationales and analyses" by which various Courts of Appeals have searched "for an appropriate case in which to apply estoppel against the Government," *Office of Personnel Management v. Richmond*, 496 U.S. 414, 422 (1990). By applying the doctrine of "practical interpretation," the appellate court has permitted Seaward to do indirectly what it was prohibited from pursuing directly.[4]

Because the doctrine of "practical interpretation," expressed by this Court in *Old Colony Trust*, has never before been recognized by this Court as an equitable bar to the Government in a contract action, the opinion of the Fourth Circuit presents an unsettled and important question of Federal law which should be decided by this Court.

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[4]Seaward failed to plead equitable estoppel as an affirmative defense. The defense was first raised in Seaward's jury instructions. However, the District Court rejected Seaward's proposed jury instruction and questioned whether equitable estoppel should apply in the case, given the sovereign function performed under the contracts. The court also properly questioned whether Dean had the authority to bind the Government. Moreover, the District Court held that Seaward had failed to establish the necessary traditional elements of equitable estoppel. *See United States ex rel. Hagood v. Sonoma County Water Agency*, 929 F.2d 1416, 1422 (9th Cir. 1991) (quoting *Heckler v. Community Health Services of Crawford County, Inc.*, 467 U.S. 51, 61 (1984)) ("defendant's 'inability to retain money that it should never have received in the first place' is not the kind of detrimental reliance that justifies estoppel against the government").

II. THIS COURT MUST RESOLVE A CONFLICT AMONG THE CIRCUITS ON WHETHER THE UNITED STATES MAY BE ESTOPPED UNDER THE *QUI TAM* PROVISIONS OF THE FALSE CLAIMS ACT BY THE REPRESENTATIONS OF A GOVERNMENT EMPLOYEE WHO LACKS AUTHORITY TO CONTRACT ON BEHALF OF THE UNITED STATES.

The decision of the Court of Appeals leaves the door of the United States Treasury ajar without a watchdog. Failing to reverse the decision of the Court of Appeals will allow future government contractors to avoid liability created by their false claims based only upon the testimony of a Government employee whose only warrant of authority is his Federal paycheck. Such a holding is clearly contrary to a court's duty "to observe the conditions defined by Congress for charging the public treasury." *Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380, 385 (1947).

If an agent without authority can speak for the Government to preclude the legitimate prosecution of a *qui tam* False Claims Act case, there is no reason why the same voice may not also bind the Government in a contract dispute, or in any other action. Clearly, the result herein should not differ simply because the action is prosecuted by *qui tam* relators on behalf of the Government. "[L]ack of authority is fatal to any claim of estoppel based on the conduct of an agent." *Bornstein v. United States*, 345 F.2d 558, 562 (Ct. Cl. 1965).

However, the Fourth Circuit's decision binds the Government to the unauthorized, personal contract interpretation of

an agent who lacks authority.[5] This represents a direct conflict with decisions of this Court. *See Heckler v. Community Health Services of Crawford County, Inc.*, 467 U.S. 51, 66 (1984); *Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380, 383-84 (1947).

The Fourth Circuit's opinion also conflicts with decisions of other Courts of Appeals on the same matter. *See United States v. Killough*, 848 F.2d 1523, 1526-27 (11th Cir. 1988) (estoppel denied as a defense to a False Claims action, where Government agent lacked authority); *see also Strauch v. United States*, 637 F.2d 477, 482 (7th Cir. 1980) (quoting *Goldberg v. Weinberger*, 546 F.2d 477, 481 (2d Cir. 1976), *cert. denied*, 431 U.S. 937 (1977)).

In *United States v. Killough*, 848 F.2d 1523, (11th Cir. 1988), the Eleventh Circuit held that for estoppel to apply against the Government in a False Claims Act dispute, "(1) the traditional elements of estoppel must have been present; (2) the government must have been acting in its proprietary capacity as opposed to its sovereign capacity; and (3) *the government's agent must have been acting within the scope of his or her authority.*" 848 F.2d at 1526 (citing *United States v. Vonderau*, 837 F.2d 1540, 1541 (11th Cir. 1988)) (emphasis added). The defendant in *Killough* claimed that the Government should be estopped from prosecuting its civil complaint under the False

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[5]Under the Federal Acquisition regulations, only a Contracting Officer may bind the Government, to the extent of his authority. "Contracting officer" is defined as "a person with the authority to enter into, administer, and/or terminate contracts and make related determinations and findings." FAR 2.101, App. at 36a. At trial, Dean acknowledged that his interpretations, alone, could not bind the Government, and that he must consult the Contracting Officer to insure that his interpretation is consistent with the contract. As to all other Government contracts to which Dean had responsibility, Dean consulted the appropriate Contracting Officers to ensure that his interpretations were correct, yet he interpreted the hull cleaning contracts "on [his] own."

Claims Act because of the representations of an Assistant United States Attorney, who agreed to compromise the claims against the defendants. The Eleventh Circuit held that the Assistant United States Attorney lacked the authority to bind the Government to such an agreement. *Killough*, 848 F.2d at 1526-27 (citing *United States v. Kates*, 419 F. Supp. 846, 858 (E.D. Pa. 1976)).

To be sure, as a Government contractor, Seaward had a duty to familiarize itself with the legal requirements for cost reimbursement under its Navy contract. When questions arose concerning per diem and mob/demob cost reimbursement, Seaward's own action in consulting Dean and other low-level contract administrators "demonstrates the necessity for it to have obtained an interpretation of the applicable regulations; respondent indisputably knew that this was a doubtful question not clearly covered by existing policy statements."[6] *Heckler v. Community Health Services of Crawford County, Inc.*, 467 U.S. at 64.

Yet in this case, Seaward made no attempt to have the questions resolved by the Contracting Officer; "it was satisfied with the policy judgment of a mere conduit." *Id.*, 467 U.S. at 65. Seaward, therefore, prepared its invoices and cost summary reports "on the basis of an oral policy judgment by an official who, it should have known, was not in the business of making policy. That is not the kind of reasonable reliance that would even give rise to an estoppel against a private party. It therefore cannot estop the Government." *Id.*, 467 U.S. at 66.

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[6]Prior to Relators' False Claims Act complaint, Seaward consulted contract administrators at the Naval Sea Systems Command for contract interpretations whenever questions arose regarding per diem.

This Court left open the question of "whether an estoppel claim could ever succeed against the Government."[7] *Office of Personnel Management v. Richmond*, 496 U.S. at 423. *See Heckler v. Community Health Services of Crawford County, Inc.*, 467 U.S. at 68 (REHNQUIST, J., concurring) ("our cases have left open the possibility of estoppel against the Government only in a rather narrow possible range of circumstances"); *Schweiker v. Hansen*, 450 U.S. 785, 792 (1981) (*per curiam*) (MARSHALL, J., dissenting) ("we will know an estoppel when we see one"). Because a conflict exists among the circuits, and because the Fourth Circuit's opinion presents an important question of Federal law which has not, but should be, resolved by this Court, a writ of certiorari should issue to review the decision of the Fourth Circuit.

III. THIS COURT MUST RESOLVE THE SEVERAL CONFLICTS AMONG THE CIRCUITS REGARDING THE SCOPE OF APPELLATE REVIEW FROM A JUDGMENT AS A MATTER OF LAW

In *Schwimmer v. Sony Corporation of America*, 459 U.S. 1007, 1008-09 (*per curiam*) (WHITE, J., dissenting), *rehearing denied*, 459 U.S. 1138 and 1189 (1983), this Court declined to grant a petition for writ of certiorari to resolve the considerable conflict among the circuits concerning the scope and the nature of proof required in an appellate court's review of

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[7]Since the doctrine of equitable estoppel against the United States was first addressed by this Court in *Lee v. Munroe & Thornton*, 7 Cranch 366, 3 L. Ed. 373 (1813), the Supreme Court has reviewed the application of the doctrine in several subsequent cases. In no case has the Supreme Court ever held the Government to be estopped contractually by the representation or conduct of its agents. *See Office of Personnel Management v. Richmond*, 496 U.S. at 422; *Heckler v. Community Health Services of Crawford County, Inc.*, 467 U.S. at 66-67 (REHNQUIST, J., concurring).

a judgment notwithstanding the verdict. The need for resolving this conflict has not abated with the passage of time. *See Uniroyal, Inc. v. Duke*, 112 S. Ct. 429 (1991) (denial of writ of certiorari to the Fourth Circuit to review conflict among circuits regarding the scope of review of judgment notwithstanding the verdict). Lacking a uniform rule, Federal Courts of Appeals have adopted four different approaches to deciding this issue.

The first approach, employed by the Eighth[8] and Sixth[9] Circuits, limits the court's review to the evidence of the nonmoving party to determine if it supports the jury's verdict. At various times the Fourth Circuit has adopted this approach.[10]

The second approach, adopted by the First,[11] Second,[12]

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[8]*Dace v. ACF Industries, Inc.*, 722 F.2d 374, 376 (8th Cir. 1983) ("evidence produced by the prevailing party must be disregarded"), *rehearing denied*, 728 F.2d 976 (8th Cir. 1984) (*per curiam*); *Koch Security v. Secretary of the Dept. of Health, Education & Welfare*, 590 F.2d 260, 261 (8th Cir. 1978) (citing *Williams v. Nichols*, 266 F.2d 389, 393 (4th Cir. 1959)); *Simpson v. Skelly Oil Co.*, 371 F.2d 563, 567 (8th Cir. 1967).

[9]*Felton v. Spiro*, 78 F. 576, 582-83 (6th Cir. 1897); *General American Life Ins. Co. v. Central National Bank of Cleveland*, 136 F.2d 821, 823 (6th Cir. 1943).

[10]*See, e.g., Williams v. Nichols*, 266 F.2d 389, 393 (4th Cir. 1959) (quoting *Felton v. Spiro*, 78 F. 576 (6th Cir. 1897)); *Ellis v. International Playtex, Inc.*, 745 F.2d 292, 298 and at 298 n. 1 (4th Cir. 1984) ("the [trial] court's sole duty is to examine the sufficiency of the evidence tendered by the party opposing the motion"; "ignoring defendant's evidence").

[11]*Layne v. Vinzant*, 657 F.2d 468, 472 (1st Cir. 1981); *Carlson v. American Safety Equipment Corp.*, 528 F.2d 384, 385 (1st Cir. 1976) ("We examine the facts in the light most favorable to plaintiff, but without neglecting the uncontradicted evidence introduced by defendant").

[12]*Lopez v. A/S D/S Svendborg*, 581 F.2d 319, 321 (2d Cir. 1978); *Bigelow v. Agway, Inc.*, 506 F.2d 551, 554 (2d Cir. 1974) ("evidence favorable to [the nonmovant] may be considered only if evidence stands uncontradicted and unimpeached"); *Simblest v. Maynard*, 427 F.2d 1, 4-5 (2d Cir. 1970).

Third,[13] and Seventh[14] Circuits, requires the court to consider both favorable and undisputed, unfavorable evidence to the nonmovant.[15]

The third approach, adopted by the Third,[16] Fifth,[17] Ninth,[18]

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[13]*Inventive Music Ltd. v. Cohen*, 617 F.2d 29, 33 (3d Cir. 1980) (cited in *Schwimmer v. Sony Corporation of America*, 459 U.S. at 1009 (WHITE, J., dissenting).

[14]*Hampton v. Hanrahan*, 600 F.2d 600, 608 (7th Cir. 1979), *modified*, 446 U.S. 754, *rehearing denied*, 448 U.S. 913 (1980) (on motion for directed verdict, the court must consider "all the evidence — disregarding conflicting, unfavorable testimony — and extract all the reasonable inferences therefrom"). *But see Hannigan v. Sears, Roebuck & Co.*, 410 F.2d 285, 288 (7th Cir.), *cert. denied*, 396 U.S. 902 (1969) (on motion for directed verdict or motion for JNOV, the court is obliged to "view all the evidence"); *Pinkowski v. Sherman Hotel*, 313 F.2d 190, 192 (7th Cir. 1963) (on motion for directed verdict, the court "must look to all the evidence in the record").

[15]Commentators have favored variations of this approach. *See, e.g.*, Wright, *Law of Federal Courts* 4th ed. (1984), at 642 ("court may consider all of the evidence favorable to the . . . party opposing the motion", taking into account "evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that this evidence comes from disinterested witnesses").

[16]*Neville Chemical Co. v. Union Carbide Corp.*, 422 F. 2d 1205, 1212 n. 7 (3d Cir.), *cert. denied*, 400 U.S. 826 (1970) (adopting a standard which requires the judge to view all the evidence); *accord Fireman's Fund Ins. Co. v. Videfreeze Corp.*, 540 F.2d 1171, 1177-78 (3d Cir. 1976), *cert. denied*, 429 U.S. 1053 (1977) (court appeared to view all the evidence, stating that "it is the function of . . . the jury . . . to weigh contradictory evidence").

[17]*Boeing Co. v. Shipman*, 411 F.2d 365, 374-77 (5th Cir. 1969) ("[o]n motions for directed verdict and for judgment notwithstanding the verdict the Court should consider all of the evidence — not just that evidence which support the non-mover's case. . ."); *Argubright v. Beech Aircraft Corp.*, 868 F.2d 764, 766 (5th Cir.), *cert. denied*, 493 U.S. 934 (1989) (the court "must also consider all evidence in the case, rather than just the evidence favorable to the nonmovant"); *Fruge v. Penrod Drilling Co.*, 918 F.2d 1163, 1165-66 (5th Cir. 1990).

[18]*Feldman v. Simkins Industries, Inc.*, 679 F.2d 1299, 1303 (9th Cir. 1982) (on motion for directed verdict, the court "must consider all the

(continued on next page)

Tenth,[19] Eleventh,[20] District of Columbia,[21] and Federal[22] Circuits, requires a court to consider all the evidence presented, both favorable and unfavorable to the nonmovant. The Fourth[23]

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evidence"); *California Computer Products, Inc. v. International Business Machines Corp.*, 613 F.2d 727, 732-34 (9th Cir. 1979) (the court must consider all evidence, both favorable and unfavorable to the nonmovant).

[19]*Anderson v. Phillips Petroleum Co.*, 861 F.2d 631, 634-35 (10th Cir. 1988) (in an ADEA case, the court viewed both parties' evidence on motion for directed verdict); *Brown v. McGraw-Edison Co.*, 736 F.2d 609, 615-16 (10th Cir. 1984) (court considered all evidence, but resolved conflicts in favor of nonmovant).

[20]*Hoffman v. Allied Corp.*, 912 F.2d 1379, 1383 (11th Cir. 1990) (on motion for summary judgment, "[t]he court must view all evidence most favorably toward the nonmoving party . . ."); *Simon v. Shearson Lehman Bros., Inc.*, 895 F.2d 1304, 1310 (11th Cir. 1990) (on motion for JNOV, "[a]ll of the evidence presented at trial must be considered") (quoting *Castle v. Sangamo Weston, Inc.*, 837 F.2d 1550, 1558 (11th Cir. 1988)); *Grant v. Preferred Research, Inc.*, 885 F.2d 795, 798 (11th Cir. 1989) ("courts must consider all of the evidence"); *Wright v. Commercial Union Insurance Co.*, 818 F.2d 832, 834 (11th Cir. 1987) (on motion for directed verdict, "the court must consider all evidence, not just evidence favoring the nonmovant"); *J&H Auto Trim Co., Inc. v. Bellefonte Insurance Co.*, 677 F.2d 1365, 1368 (11th Cir. 1982) (reconsidering all the evidence).

[21]*Richardson by Richardson v. Richardson-Merrell, Inc.*, 857 F.2d 823, 827 (D.C. Cir. 1988), *cert. denied*, 493 U.S. 882 (1989) ("The court must consider all of the evidence offered by the parties").

[22]*Quaker City Gear Works, Inc. v. Skil Corp.*, 747 F.2d 1446, 1454 (Fed. Cir. 1984), *cert. denied*, 471 U.S. 1136 (1985) (on motion for directed verdict and motion for JNOV, the court must "consider all the evidence") (quoting *Connell v. Sears, Roebuck & Co.*, 722 F.2d 1542, 1546 (Fed. Cir. 1983)).

[23]*Hughes v. Halifax County School Board*, 855 F.2d 183, 185 (4th Cir. 1988), *cert. denied*, 488 U.S. 1042 (1989) (in ruling on a motion for a directed verdict "the district court must consider the record as a whole"); *Gill v. Rollins Protective Services Co.*, 773 F.2d 592, 594 (4th Cir. 1985) (in deciding a motion for JNOV, "the trial court must consider the record as whole"); *Wyatt v. Interstate & Ocean Transport Co.*, 623 F.2d 888, 891 (4th Cir. 1980) (in ruling on a motion for JNOV, the "court must consider the record as a whole and in the light most favorable to the party opposed to the motion"); *see also Bettius & Sanderson, P.C. v. National Union Fire Insurance Co. of Pittsburgh, PA*, 839 F.2d 1009, 1014 (4th

and Sixth[24] Circuits have also employed this approach.

This fourth approach is expressed in the Fourth Circuit's panel opinion below. This approach requires "a comprehensive reading" of all the testimony, including evidence which is conflicting, impeached, and unfavorable to the nonmoving party (App. at 9a n.5). However, this approach has the greatest risk of encroaching upon the jury's province as sole fact-finder, because it permits a court to reweigh conflicting evidence. As such, a party's Seventh Amendment right to trial by jury is usurped by judicial fiat.

In considering a motion for judgment notwithstanding the verdict (*i.e.*, judgment as a matter of law), this Court has specifically prohibited any court to weigh the evidence, or to draw factual inferences in favor of the moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) ("Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of the judge. . . . The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor"). The Fourth Circuit's "comprehensive reading" approach is therefore contrary to the established precedent of this Court.

To be sure, federal circuits need guidance from the Court on the proper standard for reviewing the sufficiency of the evidence.

Cir. 1988); *Mays v. Pioneer Lumber Corp.*, 502 F.2d 106, 108 (4th Cir. 1974), *cert. denied*, 420 U.S. 927 (1975); *Grooms v. Minute-Maid*, 267 F.2d 541, 543 (4th Cir. 1959).

[24] *Morelock v. NCR Corp.*, 586 F.2d 1096, 1103-05 (6th Cir. 1978), *cert. denied*, 441 U.S. 906 (1979) (on motion for JNOV in ADEA case, court looked at both parties' evidence); *see also Scharfenberger v. Holmes*, 384 F. Supp. 1269, 1272 (W.D. Ky. 1974), *reversed*, 542 F.2d 328 (6th Cir. 1976) (quoting *Boeing Co. v. Shipman*, 411 F.2d 365 (5th Cir. 1969)) ("the federal standard requires consideration of 'all [of] the evidence — not just that which support the non-mover's case' ").

The decision here by the Fourth Circuit, presenting three insular, substantial evidentiary issues,[25] is well suited to enable this court to provide the necessary guidance for the federal circuits. Therefore, a writ of certiorari should issue to review the decision of the panel of the United States Court of Appeals for the Fourth Circuit.

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[25]After a "comprehensive reading," the panel below found that Seaward's President did not mean what he said when he testified that it was "improper for Seaward to bill the government for demobilization charges on the same day that per diem charges were being billed and incurred." The Court reached its conclusion without considering that the above testimony of Seaward's President later changed under cross-examination by Seaward's counsel. Relators submit that the Fourth Circuit failed to read the conflicts in the testimony in the light most favorable to support the jury's verdict.

Secondly, the panel below failed to give all reasonable inferences to the admissions of Seaward's supervisor regarding the improper payment of per diem to Florida divers. These admissions were admissible under 801(d)(2)(D), Fed. R. Evid. *See Crawford v. Garnier*, 719 F.2d 1317, 1324 (7th Cir. 1983) (personnel officer's statement to applicant that he should falsify his employment application to qualify for a federal employment program held admissible). These admissions, which directly conflicted with the testimony of Seaward's President on the same issue, went unrebutted and constitute substantial evidence. *Astra Pharmaceutical Products, Inc. v. Occupational Safety and Health Review Commission*, 681 F.2d 69, 74 (1st Cir. 1982) (unrebutted admissions of a party's agent regarding illegal occupational practices were substantial evidence).

Third, the Fourth Circuit ignored testimony from Seaward's and Relators' witnesses which conflicts with the Court's *de novo* evidentiary finding regarding Relators' evidentiary summaries of improper mob/demob charges. A "comprehensive reading" of the testimony of Seaward's cost accountant, Dean, and Relators' witnesses would have confirmed the District Court's holding that the summaries were not based on Seaward's accounting calendars. Moreover, the Fourth Circuit erred in the absence of its finding any error or abuse of discretion by the trial court, which admitted the summaries.

CONCLUSION

For the foregoing reasons, this Court should grant the writ and reverse the decision below.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNPUBLISHED

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 91-1642

United States of America, ex rel.
Charles I. McCoy; Seavac
International, Incorporated-USA
Plaintiffs-Appellants,

v.

Seaward Marine Services, Incorporated,
Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Virginia at Alexandria.
James C. Cacheris, Chief District Judge.
(CA-89-1323-A)

Argued: July 6, 1992

Decided: August 3, 1992
Before WILKINS, NIEMEYER, and HAMILTON, Circuit Judges.

Affirmed by unpublished per curiam opinion.

COUNSEL

ARGUED: Scott Alton Mills, FALK & CAUSEY Washington, D.C. for Appellants. Jerome P. Facher, HALE & DORR, Washington, D.C. for Appellee. **ON BRIEF:**

James H. Falk, Sr., James H. Falk, Jr., John M. Falk, FALK & CAUSEY, Washington, D.C., for Appellants. James L. Quarles, III, HALE & DORR, Washington, D.C.; Buel White, Richard H. Saltsman, VERNER, LIIPFERT, BERNHARD, MCPHERSON & HAND, Washington, D.C., for Appellee.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

OPINION

PER CURIAM:

Charles McCoy and Seavac International Inc.[1] (the "Relators") appeal the district court's order granting judgment as a matter of law in favor of Seaward Marine Services, Inc. (Seaward) and, in the alternative, a new trial. Fed. R. Civ. P. 50, 59. The Relators brought this *qui tam*[2] action under the False Claims Act, 31 U.S.C. §§ 3729-33 (the Act).

The Relators alleged that Seaward submitted false claims to the United States Navy (Navy) in connection with its contracts for providing ship hull-cleaning services. The Relators claimed that Seaward improperly: (1) billed for the cost of performing a partial hull-clean when the cost was in excess of a full

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[1]McCoy is a former employee of Seaward who now works for Seavac. Seavac is a direct competitor of Seaward.

[2]A *qui tam* action is an action brought by individual(s) under federal law which provides for a penalty for the commission or omission of a certain act. The penalty, recoverable in a civil action, is shared by the government and the individual(s). *Qui tam* literally means "on behalf of." *Black's Law Dictionary* 1251 (6th Ed. 1990). Such an action is called a *qui tam* action because "the plaintiff states that he sues as well for the state as for himself." *Id.*

hull-clean, (2) billed the Navy for mileage costs and per diem reimbursement on the same day, and (3) billed the Navy for per diem reimbursement for diverse residing in the same area in which contract work was performed.

The jury returned a verdict in Seaward's favor on the first claim and in the Relators' favor on the second and third claims in the amount of $763,620, which was trebled under provisions of the Act.

Finding that the Relators failed to carry their burden of proving a false claim, the district court granted judgment as a matter of law in favor of Seaward, and in the alternative a new trial. This appeal followed.

We agree with the holding of the district court that the Relators failed to show that Seaward knowingly submitted a false claim to the United States Government, therefore, we affirm the decision of the district court.[3]

I

Seaward is a private contractor that performs a substantial amount of contract work for the Navy. Its services primarily consist of underwater cleaning of hulls and propellers on a variety of Navy ships. To provide this service, Seaward maintains teams of divers in zones which cover the Navy's areas of operations. Seaward provided these services in accordance with three consecutive fixed-price, indefinite quantity contracts. The particular contracts under which Seaward allegedly mischarged the Navy were the 1984 and 1989 contracts (Contracts).

With respect to the East Coast operations, the Contracts required Seaward to maintain a base office in Norfolk, Virginia.

[3]Our decision obviates the necessity of considering the district court's conditionally granting a new trial.

The Contracts provided that the Navy would reimburse Seaward for the per diem expenses of its divers, at a flat rate, as follows:

> The Contractor will also be reimbursed for the reasonable actual subsistence costs (including lodging) incurred after arrival at and prior to departure from a CONUS [Continental United States] remote work site . . . . The limitations applicable to subsistence will be in accordance with the Joint Travel Regulations for Department of Defense [(JTRs)]. . . .

(Contracts Joint Appendix (J.A.) 1540, 1394). With respect to the East Coast operations, a remote work site is any worksite other than the home base in Norfolk. The amount of the per diem reimbursement varied from location to location, depending on the monetary limitations established by the JTRs.

The Contracts also allow Seaward a fixed amount per mile for the costs of moving men and equipment to a remote work site — referred to as mobilization — and the same amount per mile for the cost of returning men from the remote work site — referred to as demobilization.

> Mobilization/Demobilization are the total costs including crew salary incurred by the Contractor to move the equipment and crew to and from work locations [i.e. remote work sites] (outside of the normal base of operations) cited in the Task Assignment.

(Contracts J.A. 1392, 1538). The Contracts provide that these charges, collectively referred to as mob/demob charges, could not be incurred "simultaneously" with per diem charges, and

neither mob/demob nor per diem expenses could be paid for operations in Norfolk. (Contracts J.A. 1394, 1540).

Seaward paid the per diem to its men for each day they were present at a remote work site. Seaward also billed for mob/demob costs for every day the men and equipment were in transit from or to a remote work site. As a result of these practices, on days when a crew arrived at or departed from a remote work site, Seaward billed for both mob/demob costs and per diem reimbursement. This is because, on such days, the crew was present at the remote work site for part of the day and in transit for part of the day. If the crew was in transit for an entire day and neither arrived nor departed a remote work site on that day, they did not receive a per diem reimbursement. The Relators contend that this policy violated the Contracts' provisions against billing mob/demob costs and per diem costs simultaneously.

Seaward paid the per diem to divers at remote sites even though some of the men maintained residences near the remote work site. The Relators contend that this policy was fraudulent. Although the contract does not specifically prohibit this, the Relators contend that the Contracts' reference to the JTRs incorporated the substantive provision of those regulations which, among other restrictions, precluded the payment of per diem expenses within the area of residence.

At trial, two witnesses from the Navy with contracting responsibility testified. One, the contracting officer, John Vollmer, was called by the Relators. The second, Michael S. Dean, the head of the Navy's Underwater Ship Husbandry Division, was called by Seaward.

Mr. Vollmer was the procuring officer with authority to sign and execute contracts on behalf of the Navy. Vollmer testified that Seaward was entitled to bill for per diem reimbursement

incurred at work sites other than Norfolk, Virginia. He did not specifically testify that mob/demob and per diem could not be paid on the same day or that it was improper to seek per diem reimbursement for divers who lived near a remote work site. Vollmer did testify that Dean was the official responsible for overseeing the Contracts. Dean stated that he was responsible for the day-to-day supervision of the Contracts, that he initiated necessary changes, and that he wrote the 1989 contract. He testified that any location outside of Norfolk was a remote work site and that Seaward was entitled to reimbursement of per diem costs, regardless of the divers' residence, so long as the diver was at a remote work site. He further testified that no provisions of the JTRs applied to the parties' contractual relationship, other than the monetary ceiling limitations, and that it was permissible for Seaward to bill mob/demob and per diem costs on the same day, provided the crew arrived or departed the remote work site on that day.

Seaward's President, John Armstrong, also testified that it was his understanding that the JTRs did not apply to the Contracts outside of the monetary ceiling limitations. He confirmed that Seaward paid per diem regardless of the divers' residence and billed for per diem and mob/demob expenses on the same day if the divers were both present at the remote work site and traveled on that day.

The district court determined that the unambiguous meaning of the word "simultaneously" did not encompass "on the same day." Furthermore, the district court stated that, even if the term was ambiguous, the clear testimony of both parties was that the Contracts permitted same day charges for per diem and mob/demob. The district court held, therefore, that Seaward was entitled to judgment as a matter of law on the same day charge claim.

With respect to the Relator's claim that it was improper, pursuant to the JTRs, to bill for per diem at remote work sites for divers who resided near those sites, the district court noted that the parties to the Contracts also agreed the JTRs, except with respect to per diem monetary limitations, did not apply to the Contracts. The residence of a diver, therefore, was irrelevant. The district court held that Seaward was entitled to judgment as a matter of law on this claim.

II

The standard for granting a judgment as a matter of law is essentially the same standard as that used for granting summary judgment. In discussing the relevant inquiry on motion for summary judgment and motion for directed verdict,[4] the Supreme Court stated: "the primary difference between the two motions is procedural . . . In essence, though, the inquiry under each is the same; whether the evidence presents sufficient disagreement to require submission to a jury or whether it is so one sided that one party must prevail as a matter of law." *American v. Liberty Lobby, Inc.*, 477 U.S. 242, 251 (1986).

III

We agree with the district court's holding. In order to state a claim in this *qui tam* action, the Relators were required to plead and prove that Seaward:

> ***knowingly*** present[ed] or caus[ed] to be presented, to an officer or employee of the United States Government, or member of the Armed Forces of the United States a false or fraudulent claim for payment or approval.

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[4]As of December 1, 1991, both the directed verdict and judgment notwithstanding the verdict are referred to collectively as "Judgment as a Matter of Law" under Fed. R. Civ. P. 50.

31 U.S.C. § 3729(a)(1) (emphasis added). The use of the term "knowingly" has a special meaning within the context of the Act.

> Knowing and Knowingly defined — For purposes of this section, the terms "knowing" and "knowlingly" mean that a person, with respect to information —
>
> > (1) has actual knowledge of the information;
> >
> > (2) acts in deliberate ignorance of the truth or falsity of the information; or
> >
> > (3) acts in reckless disregard of the truth or falsity of the information,
>
> and no proof of specific intent to defraud is required.

31 U.S.C. § 3729(b).

The Relators' claims are based on an alleged false interpretation of the Contracts by Seaward. As the district court noted, even if there is ambiguity in a contract, the parties' construction of that contract generally controls. *Management Sys. Assocs. v. McDonnell Douglas Corp.*, 762 F.2d 1161, 1172 (4th Cir. 1985), (citing *Cole v. Indus. Fibre Co.*, 157 S.E.2d 857 (N.C. 1931)). If both the contractor and the government interpret the contract one way throughout the contract's history, it is unthinkable that the contractor's billings which follow this common interpretation could constitute a false claim. Dean, the Navy's hull cleaning program director, contract technical advisor, and the author of the 1989 contract, testified that the per diem and mob/demob costs billed to the Navy by Seaward were appropriate. Armstrong, the President of

Seaward also testified to this effect.[5] It cannot be said, therefore, that Seaward "knowingly" submitted a false claim.[6] The Relators failed to show an essential element of a false claims action and judgment as a matter of law was appropriate. Accordingly we affirm the decision of the district court granting judgment as a matter of law in favor of Seaward.

AFFIRMED

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[5]The Relators claim that there is a conflict in Armstrong's testimony on this point. We agree with the district court, however, that a comprehensive reading of Armstrong's testimony allows only one construction, *i.e.*, that Armstrong interpreted the Contracts to permit same day charges and per diem reimbursement for divers residing near the remote sites, The Relators also argue that the actions of a Seaward supervisor, in informing a diver who lived near a remote site that he could not receive the per diem, indicated that Seaward's true interpretation was that the Contracts did not permit payment of per diem to divers residing near a remote site. However, the action of a single supervisor in one instance does not amount to a course of conduct, particularly when there was no evidence that the supervisor was told this was the proper interpretation of the Contracts, and where Seaward billed the Navy in accordance with Armstrong's interpretation and contrary to the supervisor's action.

[6]The Relators emphasize that, at least with respect to ninety-two particular claims, it is clear that per diem charges were improperly billed. They base this on Armstrong's testimony that billing for per diem, while the crew was in Norfolk, was improper, and the summary of expense documentation indicated that demob to Norfolk occurred on the same day that travel to Norfolk occurred. The Relator's effort to differentiate these claims fails for two reasons. First, the only basis for the Relator's assertion that per diem and mob/demob were paid while the crew was in Norfolk was informal calendar entries prepared by a Seaward clerk. The only testimony concerning the meaning of these entries was given by that clerk. She testified that the entries did not mean the crew was paid per diem in Norfolk. Secondly, the Relators presented no evidence that the ninety-two claims were any different from the other claims in which mob/demob and per diem were paid on the same day, *i.e.*, no evidence was given that the crew was not present at the remote site sometime during the day the per diem was paid.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

ALEXANDRIA VIRGINIA

Civil Action No. 89-1323-A

UNITED STATES OF AMERICA, *ex rel.*
CHARLES I. McCOY and
SEAVAC INTERNATIONAL, INC.,
Plaintiffs,

v.

SEAWARD MARINE SERVICES, INC.
Defendant.

ORDER

For the reasons stated in the accompanying memorandum opinion, the defendant's motion for judgment n.o.v. is GRANTED and the defendant's motion for a new trial in the alternative is GRANTED.

The Clerk shall forward copies of this order to all counsel of record.

James C. Cacheris
United States District Judge

May 23, 1991
Alexandria, Virginia

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

ALEXANDRIA VIRGINIA

Civil Action No. 89-1323-A

UNITED STATES OF AMERICA, *ex rel.*
CHARLES I. McCOY and
SEAVAC INTERNATIONAL, INC.,
Plaintiffs,

v.

SEAWARD MARINE SERVICES, INC.
Defendant.

MEMORANDUM OPINION

Before the court are two motions; (1) defendant Seaward Marine Services, Inc. moves for judgment n.o.v. or, alternatively, a new trial, and (2) plaintiffs and relators Charles I. McCoy and Seavac International, Inc. move the court to set statutory civil penalties based upon the jury verdict of April 13, 1991.

I. Procedural History

Six categories of alleged false claims have been adjudicated in this case.

The relators claimed that Seaward submitted false claims by paying and billing for per diem expenses to its divers at a flat-rate, instead of paying and billing for only the actual per

diem expenses of its divers. The court granted summary judgment to Seaward on this issue on March 8, 1991, holding that this did not constitute a false claim. At that time, the relator also agreed that two allegations in their complaint were not valid causes of action under the False Claims Act: the claim that Seaward altered or forged invoices and the claim that Seaward had supplied illegal gratuities to Navy personnel. Accordingly, the court struck these claims from the complaint on March 8, 1991. An order clarifying this ruling was issued on March 15, 1991.

The remaining five categories of claims went to trial. At the close of all of the evidence, the court granted a directed verdict to the defendant on two claims and part of a third. The court dismissed the claim that it was improper for Seaward to bill the Navy for a "full clean" of its ships when a full clean had been ordered but not performed due to the shallowness of the water. The court also dismissed the claim that it was improper to bill for a "full clean" of a ship while also billing for the use of certain instruments to clean special parts of the same ship. In addition, the relators had maintained that it was a false claim for the sum of the charges under a partial clean to exceed the amount chargeable under the full-clean contract provisions, Line Item 0001. The court held this that claim was cut off as of October 3, 1986, due to a contract amendment. Accordingly, this claim was sent to the jury only for the time period before October 3, 1986.

On April 3, 1991, the jury returned its verdict on the remaining claims. It returned a defendant's verdict on the allegation that it was a false claim to bill for partial cleaning charges which exceeded the cost of a full clean. The jury returned a plaintiffs' verdict on the other two counts. The jury found that the defendant's billing the Navy for mobilization/demobilization costs ("mob/demob") and per diem costs at the same time

constituted a false claim. The jury also found that the defendant's payment of per diem costs to Seaward divers living in the Jacksonville/Mayport, Florida area constituted a false claim. Between these two categories, the jury found that Seaward had submitted 886 false claims.

The defendant has moved for judgment n.o.v. or a new trial in the alternative. The relators have made no motion regarding the one claim resolved in favor of the defendant by the jury.

I. Standards of Review

A. The Standard for Considering a Judgment N.O.V. Motion

"JNOV should not be granted unless the evidence is so clear that reasonable men could reach no other conclusion than the one suggested by the moving party." *Persinger v. Norfolk & Western Railway Co.*, 920 F.2d 1185, 1189 (4th Cir. 1990). Yet, a "mere scintilla" of evidence in support of the non-moving party's case is not sufficient to withstand judgment n.o.v. *Crinkley v. Holiday Inns, Inc.*, 844 F.2d 156, 160 (4th Cir. 1988). In considering this motion, the evidence and all inferences must be viewed in the light most favorable to the non-moving party, and "the credibility of all evidence favoring the non-moving party is assumed." *Id.*

The relators have misstated this standard in their brief in opposition to judgment n.o.v. Citing *Ellis v. International Playtex, Inc.*, 745 F.2d 292 (1984), they argue that the court should not consider the evidence presented by the defendants when contemplating judgment n.o.v. and that doing so would constitute an impermissible weighing of the evidence. This is not so. The *Ellis* court held that the court should not weigh the plaintiff's evidence against the defendant's in considering

judgment n.o.v. It did not hold that that defendant's evidence is irrelevant. For example, this evidence may fill in gaps in the plaintiff's case and demonstrate the failure of the plaintiff's theory, and it may establish conclusively an affirmative defense. *See, e.g., E.E.O.C. v. State of Delaware Department of Social Services*, 865 F.2d 1408, 1414-16 (3rd Cir. 1989) (the defendant's evidence was considered in deciding whether judgment n.o.v. should be granted to the defendant based on an affirmative defense).

B. The Standard for Considering a Motion for a New Trial

The standard for considering a motion for a new trial under Federal Rule of Civil Procedure 59 is different than the standard for Judgment n.o.v., and it is less onerous to the moving party:

> On such a motion it is the duty of the judge to set aside the verdict and grant a new trial, if he is of the opinion that the verdict is against the clear weight of the evidence, or is based upon evidence which is false, or will result in a miscarriage of justice, even though there may be substantial evidence which would prevent the direction of a verdict. The exercise of this power is not in derogation of the right of trial by jury but is one of the historic safeguards of that right.

Gill v. Rollins Protective Services Co., 836 F.2d 194, 196 (4th Cir. 1987), *quoting Aetna Casualty & Surety Co. v. Yeatts*, 122 F.2d 350, 352-53 (4th Cir. 1941).

C. The Elements of a False Claims Act Claim

In order to state a claim, the plaintiff must plead and prove (1) that the defendant presented or caused to be presented a claim for payment to the United States, (2) that the claim was false or fraudulent, and (3) that the defendant's submission of a false claim was "knowing." 31 U.S.C. § 3829(a) and (b). This usage of "knowing" in the False Claims Act has a special meaning.

On October 27, 1986, Congress amended the False Claims Act. Among other things, it defined the meaning of the word "knowingly" as it is used in the following representative phrase in the Act: "Any person who . . . knowingly presents . . . a false or fraudulent claim for payment or approval . . . is liable to the United States Government." 31 U.S.C. § 3729. This is the new statutory definition of "knowingly:"

> (b) **Knowing and knowingly defined.** — For purposes of this section, the terms "knowing" and "knowingly" mean that a person, with respect to information —
>
> (1) has actual knowledge of the information;
>
> (2) acts in deliberate ignorance of the truth or falsity of the information; or
>
> (3) acts in reckless disregard of the truth or falsity of the information,
>
> and no proof of specific intent to defraud is required.

31 U.S.C. § 3729(b).

This section is partially ambiguous. If prong (b)(1) was read literally, it would create strict liability for the validity of claims submitted to the government. More specifically, a person

knowingly who submits a claim to the government that is false would be liable, even if: (a) he had no knowledge of the falsity of the claim, (b) he was not deliberately indifferent to the truth or falsity of the claim, and (c) he did not act with a reckless disregard to the truth of (sic) falsity of the claim. This reading would eviscerate any purpose for adding prongs (b)(1) and (b)(2). It also would not comport with the apparent intent of Congress in making this amendment. Congress did not intend to create liability for mere negligence; instead, it intended to prevent companies from engaging in ostrich-like behavior in order to avoid liability. This legislative history is recounted in *United States v. Entin*, 750 F.Supp. 512, 518 (S.D. Fla. 1990).

Accordingly, this court reads prong (b)(1) to permit liability where the defendant has actual knowledge of the falsity of the information. This gives meaning to prongs (b)(2) and (b)(3), which permit liability in cases of "deliberate ignorance" and "reckless disregard," respectively.

III. Defendant's Argument in Favor of Judgment N.O.V. — Mob/Demob

At issue is the meaning of a provision of the contract between Seaward and the Navy, which states "[t]he Contractor may not incur costs under Line Item 0015[1] and Line Item

---

[1]Line Item 0015 states:

Mobilization/Demobilization are the total costs including crew salary incurred by the Contractor to move the equipment and crew to and from work locations (outside of the normal base of operations) cited in the Task Assignment. The contractor will be reimbursed on the basis of the number of miles travelled multiplied by the mileage rate as specified in the Schedule for CONUS locations. The mileage rate is the sum total of all costs incurred per mile to Mobilize and Demobilize men and equipment to complete the assigned task.

001801 *simultaneously*." (Emphasis added). Line Item 001801 is the provision regarding the payment of per diem subsistence costs. Line 0015 concerns mobilization and demobilization ("mob/demob") costs. Relators contend that this provision prohibits billing for mob /demob and per diem expenses *on the same day*. In fact, the relators' theory relies on this interpretation, and its brief implies that judgment n.o.v. is appropriate if their interpretation is wrong. Seaward contends that this provision only prohibits billing for mob/demob and per diem *at the same time*, and that it does not prohibit billing per diem and mob/demob on the same day as long as the mob or demob ends before that day is over.

At the heart of this issue is the meaning of the word "simultaneously." If this term's meaning is unambiguous, then the court can interpret the contract as a matter of law. In the False Claims Act arena, it is the province of the court to interpret the contract as a matter of law. In *United States v. Race*, 632 F.2d 1114 (4th Cir. 1980), the court held that the meaning of a contract provision "was purely a matter of law for the court, which should have granted the defendants' motion to dismiss" because the contract did not support the plaintiff's theory of the case. *Id.* at 1120. *See also United States v. Hanger One, Inc.*, 406 F.Supp. 60, 84 (N.D. Ala. 1975), *rev'd on other grounds*, 563 F.2d 1155 (5th Cir. 19 77) (holding that the construction of a contract in a False Claims Act case is a matter of law for the court to resolve); *Sherwood Distilling Co. v. Reconstruction Finance Corp.*, 201 F.2d 42, 46 (4th Cir. 1952) (in a non-False Claims Act case, the court stated the general proposition that the interpretation of contracts is "wholly within the province of the Court"). If the term is ambiguous, then appropriate extrinsic evidence may be considered in interpreting it.

It is a close call as to whether the word "simultaneously" is ambiguous in the context of the present lawsuit. Although it cuts against their position, the relators have argued in their previous memoranda that "simultaneously" should be accorded its primary dictionary definition.The dictionary definition was also the basis for the contention of the President of relator Seavac, Gregory Dies, that mob/demob and per diem cannot be billed on the same day. *See, e.g.*, Dies Dep. at 960.

According to *Webster's Ninth New Collegiate Dictionary*, "simultaneous" means "existing or occurring at the same time: exactly coincident." *Webster's Ninth New Collegiate Dictionary*, p. 1099 (1986). The relators have expanded this dictionary definition by asserting that mob/demob and per diem costs incurred *on the same day* cannot both be reimbursed. The relators have not cited any other provision of the contract to support their "on the same day" gloss on the term "simultaneously." As a matter of common sense, two events can occur on the same day and not be simultaneous. The court would have been justified in granting summary judgment to the defendant on this basis.

Yet, the court allowed this claim to proceed to trial and go to the jury on the possibility that the parties both understood this provision to prohibit billing on the same day (i.e., course of performance meaning), or the possibility that this usage of "simultaneously" had a special meaning in the defense contracting industry (usage of trade). In addition, as the Fourth Circuit has often stated, it is appropriate in close cases to allow a claim to go to the jury and grant judgment n.o.v. afterward so that retrial might be avoided if the grant of judgment n.o.v. is reversed on appeal.

Assuming *arguendo* that "simultaneously" is ambiguous, the best evidence for interpreting the contract is the parties' understanding. As the Fourth Circuit has stated:

> The general rule, is that, where, from the language employed in a contract a question of doubtful meaning arises, and it appears that the parties themselves have interpreted their contract, practically or otherwise, the courts will ordinarily follow such interpretation, for it is to be presumed that the parties to a contract know best what was meant by its terms, and are less liable to be mistaken as to its purpose and intent . . . .

Management Systems Associates, Inc. v. McDonnell-Douglas Corp., 762 F.2d 1161, 1172 (4th Cir. 1985), *quoting Cole v. Fibre Co.*, 200 N.C. 484, 157 S.E. 857 (1931). This statement of law originated in *Old Colony Trust Co. v. Omaha*, 230 U.S. 100, 118, 33 S.Ct. 967, 972 (1913), where the court stated that "the practical interpretation of a contract by the parties for any considerable period of time before it comes to the subject of controversy, is deemed to be of great, if not controlling, influence." 33 S.Ct. at 972.

As an aside, in the False Claims Act arena, the premise that the parties' interpretation of the contract is the preferred type of extrinsic evidence is a matter of common sense and fairness. While the Act is civil in name, it is punitive in nature. If a contract is ambiguous, and if both the contractor and the government have interpreted it one way throughout the contract's history, it is unthinkable that the contractor's billings which follow this common interpretation could constitute a false claim.

Any lingering doubt about the meaning of "simultaneously" was removed at trial.[2] The pertinent view of the Navy's

[2]In their most recent brief, the relators' counsel argued, *inter alia*, that the court ruled that the claims which were submitted to the jury were false claims as a matter of law. The court made no such ruling. When jury instructions were being discussed, the court began to read from a stock

(continued on next page)

interpretation was supplied by Michael Dean, who was the Navy official entrusted with the overall responsibility of managing the contract. Dean testified that the contract permitted the billing of per diem and mob/demob on the same day. The relators were unable to shake Dean from this position. They speculate in their brief in opposition to judgment n.o.v. that Dean must have been lying in order to avoid becoming the scapegoat for False Claim Act violations during his tenure. Yet, the relators were unable to elicit any testimony to support their speculation.

In previous motions, the relators have argued repeatedly that Dean's testimony is irrelevant because he was not the contracting officer on the at-issue contract, and, thus, he had no authority to alter that contract. The relators miss the point of Dean's testimony. In the case of ambiguity, the understanding of the parties becomes relevant. Dean's testimony cast light on the Navy's understanding of the word "simultaneously" during the time period at-issue. Yet, even if intent of the contracting officer, John Vollmer, is somehow more relevant, he did not testify that "simultaneously" meant "the same day." In fact, although he was not questioned extensively on this issue, he testified that the contract only prohibited billing for per diem and mob/demob "at the same time." (Trans. p. 60).[3]

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jury instruction which contained language indicating that the court had found the at-issue claim to be false. This was not a finding regarding the case at bar, and the court ultimately sent the issue of the falsity of the claims to the jury. Indeed, if one examines the portion of the transcript upon which this argument is based, it is clear that this instruction was offered by the court erroneously and not given to the jury.

[3]This was the one question on this issue which was posed to Vollmer by the relators' counsel:

MR. MILLS QUESTIONING MR. VOLLMER:

Q What is meant by simultaneous?

A The mobilization/demobilization is Item 13, and while in transit, both of these line items could not be incurred at the same time.

The relators hang their hat on one colloquy between defense counsel and Seaward's president, R. John Armstrong; yet, this passage does not support their position. The relators argue that he admitted that mob/demob and per diem cannot be billed on the same day. Yet, the relators omitted from their brief a portion of this colloquy, in which Armstrong qualifies his position and states that it would be impermissible to bill for demob and per diem when the crew is returning to Norfolk. This comports with the court's understanding of Armstrong's testimony.[4]

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[4]This is the complete portion of Armstrong's testimony:

MR. MILLS QUESTIONING MR. ARMSTRONG:

Q Didn't Mr. Dean agree with your opinion of your policy at Seaward that it would be improper for Seaward to bill the government for demobilization charges on the same day that per diem charges were being billed and incurred?

A Yes.

Q And isn't that in fact the policy of Seaward?

A What?

Q Not to bill per diem and demobilization charges on the same day?

A Yes.

Q Isn't that not only the policy of Seaward, but also Seaward's contract interpretation?

A I think — *did you just say the policy not to bill demob back to Norfolk and subsistence on the same day?*

Q *Correct. Isn't that the policy?*

A *That's the policy, yes.*

Q Isn't that also Seaward's contract interpretation of the hull cleaning contract?

A Yes.

* * *

Q Do you agree that if Seaward knowingly incurred per diem on the same day that it incurred demobilization, that that practice would be a breach of the hull cleaning contract?

* * *

A It would be a mistake. I'm not sure all the other factors [sic] that would have to come into play.

Transcript pp. 122-24 (emphasis added).

Perhaps in recognition of the weakness of its position, relators argue as follows:

> Defense counsel attempts to create a smoke screen on the issue, claiming that Mr. Armstrong's testimony applied only to demob back to Norfolk. Defendant's position really misses the point. The issue of the parties' contract interpretation depends not on ***where*** the mob/demob occurred, but ***when*** it occurred, and whether the charge to the government constituted a simultaneous incurrence of cost with per diem. Clearly, whether it was mob or demob is irrelevant to the point which Mr. Armstrong admitted: billing the government would be wrong if the charges were incurred on the same day.

(Relators' brief in reply to Seaward's reply to relators opposition to Seaward's motion for judgment n.o.v. or a new trial in the alternative, p. 6). This argument is erroneous. By his testimony, Armstrong meant that one could not bill for per diem on the day when a crew was demobilizing back to Norfolk because per diem could not be paid to crew members in Norfolk. Armstrong's thesis was that if the crew were going anywhere other than Norfolk, once mobilization was over, per diem could be billed for the remainder of the of the day.

In addition, once this colloquy with Armstrong is understood, there is no evidence that Seaward "knowingly" submitted a false claim. No witness and no exhibit indicated that Seaward knew that this claim was false (which it was not), or that Seaward was deliberately ignorant of the truth or falsity of its claim, or that it recklessly disregarded the truth or falsity of its claim.

In sum, the jury verdict on this issue must be set aside because these claims were not false and the requisite intent

was not proven. The relators have attempted to place a gloss on the word "simultaneously" that is not supported by either the plain language of the contract or the understanding of parties. Judgment n.o.v. is granted to the defendant on this issue.

IV. Defendant's Argument in Favor of Judgment N.O.V. — Florida Divers

The parties' dispute revolves around contract Line Item 1801, which states: "The *limitations*" applicable to subsistence will be in accordance with the Joint Travel Regulations for Department of Defense civilian employees." (Emphasis added). Seaward argues that the word "limitations" only refers to the monetary ceilings in the Joint Travel Regulations ("JTR") and not to any other regulations regarding reimbursement. Relators argue that the word "limitations" incorporated other regulations in addition to monetary limits and that these other regulations made it improper to pay per diem to divers who lived in the Jacksonville/Mayport, Florida area when they performed work in that area.

This contract provision is ambiguous; it is unclear how much of the JTR was incorporated. Thus, extrinsic evidence was admitted at trial in order to resolve the matter. Because the relators bore the burden of proving that the at-issue claims were false, they bore the burden of proving that the word "limitations" incorporated more than just monetary limits.

Seaward's Anderson testified that Seaward had interpreted "limitations" to mean only that the dollar limits in the JTR applied, and that Seaward's understanding was that divers could be paid per diem as long as they were away from Norfolk. Dean, the Navy official who managed this contract, testified unequivocally that only the JTR monetary limitations were incorporated. (Trans. p. 41). Vollmer's testimony merely parroted the language of the contract. He stated, without

providing any clarification or elaboration, that the "limitations" in the JTR applied.[5]

The only other testimony that must be addressed is that of Admiral Thompson, the relators' expert witness on the interpretation of the JTR. Because the issue is the meaning of the ambiguous word "limitations" in the parties' contract, his testimony is not relevant. He did not testify about the meaning of this term in the parties' contract, and being a total stranger to the contract, he would have been incapable of doing so.

In sum, once it is established that the word "limitations" has an ambiguous scope, which the court has held, as a matter of law, then the relators have produced no evidence to support their interpretation of that phrase. The evidence adduced at trial indicated that Seaward and Dean interpreted the contract to mean that the monetary limitations in the JTR applied, and Vollmer's testimony provided no relevant information. The only reasonable conclusion, based upon the contract

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[5]The following is all of the testimony elicited from Mr. Vollmer on this issue:

MR. MILLS QUESTIONING MR. VOLLMER

Q Were there limitations placed upon the payment of per diem?

A There's a ceiling that we apply, Joint Travel Regulations.

Q But were there limitations? Were there limitations placed on per diem or on the payment of subsistence?

A Yes.

Q And what limitations were applicable in this case, in this contract?

A For the reasonable actual subsistence costs.

Q Does the contract refer to any other documents to place limitations on the payment of per diem?

A The Joint Travel Regulations for the Department of Defense Civilian Employees.

Q Would those limitations apply to employees of the contractor?

A Yes.

and this testimony, is that both parties interpreted the contract in a way favoring Seaward's position.

As an aside, the court notes the incompleteness of the relators' theory. In addition to not showing that their theory reflected the understanding of the parties, they produced no other way of discerning which "limitations" in the JTR were incorporated other than the monetary limits. In their brief in opposition to this motion, they state:

> Those limitations would include Joint Travel Regulations Part D (Glossary of Terms), Part L (Per Diem), and Appendices A & E, all of which were submitted to the jury as plaintiffs, exhibits, without prejudice from the defendant.

(Pl. Br. in Oppo. p. 14). Based upon a footnote in the relators' brief, the relators may also contend that Part J of the JTR applies. These provisions might have some relevance to per diem limitations, although that is the purpose of the entire JTR. The relators have not pointed to any contract language, any understanding of the parties, or any known industry understanding which indicates that these sections were incorporated into the parties' contract and not the other provisions of the JTR. Most likely, these provisions were selected by the relators only because they best supported this particular attempt at finding a false claim. The court cannot charge the defendant with this after-the-fact interpretation of "limitations."

Accordingly, the relators failed to carry their burden of proving a false claim, and judgment n.o.v. is granted to Seaward on this issue.

V. The New Trial Motion

This motion is not mooted by the grant of judgment n.o.v. According to Federal Rule of Civil Procedure 50(c), the court

should rule conditionally on the motion for a new trial even if judgment n.o.v. is granted.[6] *United States v. Steed*, 674 F.2d 284, 289 (4th Cir.), *cert. denied*, 459 U.S. 829 (1982) (although this is a criminal case, this rule of civil procedure was applied); *Mays v. Pioneer Lumber Corp.*, 502 F.2d 106, 110 (4th Cir. 1974), *cert. denied*, 420 U.S. 927 (1975). Indeed, because the motion for a new trial is within the discretion of the trial court (*Wilhelm v. Blue Bell, Inc.*, 773 F.2d 1429, 1433 (4th Cir. 1985), *cert. denied*, 475 U.S. 1016 (1986)), the trial court has an obligation to make a conditional ruling so that it can be reviewed, if necessary.

For the reasons stated above, the court finds that the jury's verdict is against the clear weight of the evidence. The court can discern no significant evidence which supports the contract interpretation advanced by the relators. The plain language of the two key words, "simultaneously" and "limitations," does not support their position, and neither does interpretation of the parties. Thus, the motion for a new trial is granted in the alternative.

VI. Conclusion

Since the court has granted judgment n.o.v., or a new trial in the alternative, on both of the jury verdicts rendered in favor of the relators, there is no need to consider the relators' motion to set civil penalties. This judgment is final. An order reflecting these rulings will accompany this memorandum opinion.

May 23, 1991
Alexandria, Virginia

James C. Cacheris
United States District Judge

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[6]In pertinent part, Rule 50(c)(1) states:

If the motion for judgment notwithstanding the verdict, provided for in subdivision (b) of this rule, is granted, the court shall also rule on the motion for a new trial, if any, by determining whether it should be granted if judgment is thereafter vacated or reversed, and shall specify the grounds for granting or denying the motion for the new trial.

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

CASE NUMBER: CA-89-1323-A

UNITED STATES OF AMERICA EX. REL.
CHARLES I.MCCOY & SEAVAC,
INTERNATIONAL, INC.

V.

SEAWARD MARINE SERVICES, INC.

JUDGMENT IN A CIVIL CASE

☒ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☐ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that judgment is hereby entered in favor of the plaintiff, United States of America Ex. Rel. Charles I. McCoy and SEAVAC International, Inc. in the amount of $2,290,860.00 against the defendant, Seaward Marine Services, Inc.

Judgment is entered in accordance with the Special Interrogatories submitted to the Jury. (copy of interrogatories attached)

April 3, 1991
Date

DORIS R. CASEY
Clerk

RUTH WARDMAN
(By) Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

FILED
IN OPEN COURT
APRIL 3 1991
Clerk,
U.S. District Court
Alexandria, Virginia

Civil Action 89-1323-A

USA, ex rel. CHARLES I. McCOY, *et al.*,
Plaintiffs,

v.

SEAWARD MARINE SERVICES, INC.,
Defendant.

INTERROGATORIES

(1) Did the defendant, Seaward Marine Services, Inc., knowingly submit false or fraudulent claims as to the following categories of claims:

a. Charging more for partial cleaning services than the allowable charge for a full clean.

Yes ____ No ✓

b. Charging simultaneously for a Mob/Demob and per diem expenses.

Yes ✓ No ____

c. Charging per diem for divers living in the Mayport, Florida area?

Yes ✓ No ____

(An answer of yes is a verdict in favor of the plaintiffs and an answer of no is a verdict in favor of the defendant.)

If you answered any part of question (1) yes, state total number of knowing false claims for each category.

a. 0
b. 438
c. 448

Also state the total actual damages to the United States for each category of knowing false claims.

a. 0
b. $235,815.00
c. $527,805.00

Total damages (the total of a, b, and c, above) = $763,620.00
Multiply the damages by "3." That amount is $2,290,860.00.

Dated: 4/3/91

Kelly Colinda
Foreperson
/s/ Ruth Wardman

APPENDIX D

FILED
August 31, 1992

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 91-1642
CA-89-1323-A

UNITED STATES OF AMERICA ex rel.;
CHARLES I. MCCOY; SEAVAC
INTERNATIONAL, INCORPORATED-USA
Plaintiffs-Appellants

v.

SEAWARD MARINE SERVICES, INCORPORATED
Defendant-Appellee

On Petition for Rehearing with
Suggestion for Rehearing In Banc

Appellants filed a petition for rehearing with sugggestion for rehearing in banc. No member of the Court requested a poll on the suggestion for rehearing in banc, and the original judicial panel voted to deny the petition for rehearing.

The Court denies the petition for rehearing with suggestion for rehearing in banc.

Entered at the direction of Judge Hamilton, with the concurrence of Judge Wilkins and Judge Niemeyer.

For the Court,
/s/ Bert M. Montague
CLERK

APPENDIX E

FEDERAL ACQUISITION REGULATIONS

SUBPART 1.6-CONTRACTING AUTHORITY AND RESPONSIBILITIES

1.601 General.

Authority and responsibility to contract for authorized supplies and services are vested in the agency head. The agency head may establish contracting activities and delegate to heads of such contracting activities broad authority to manage the agency's contracting functions. Contracts may be entered into and signed on behalf of the Government only by contracting officers. In some agencies, a relatively small number of high level officials are designated contracting officers solely by virtue ot their positions. Contracting officers below the level of a head of a contracting activity shall be selected and appointed under 1.603.

1.602 Contracting officers.

1.602-1 Authority.

(a) Contracting officers have authority to enter into, administer, or terminate contracts and make related determinations and findings. Contracting officers may bind the Government only to the extent of the authority delegated to them. Contracting officers shall receive from the appointing authority (see 1.603-1) clear instructions in writing regarding the limits of their authority. Information on the limits of the contracting officers' authority shall be readily available to the public and agency personnel.

(b) No contract shall be entered into unless the contracting officer ensures that all requirements of law, executive orders, regulations, and all other applicable procedures, including clearances and approvals, have been met.

1.602-2 Responsibilities.

Contracting officers are responsible for ensuring performance of all necessary actions for effective contracting, ensuring compliance with the terms of the contract, and safeguarding the interests of the United States in its contractual relationships. In order to perform these responsibilities, contracting officers should be allowed wide latitude to exercise business judgment. Contracting officers shall —

(a) Ensure that the requirements of 1.602-1(b) have been met, and that sufficient funds are available for obligation;

(b) Ensure that contractors receive impartial, fair, and equitable treatment; and

(c) Request and consider the advice of specialists in audit, law, engineering, transportation, and other fields, as appropriate.

1.602-3 Ratification of unauthorized commitments.

(a) *Definitions.*

"Ratification," as used in this subsection, means the act of approving an unauthorized commitment by an official who has the authority to do so.

"Unauthorized commitment," as used in this subsection, means an agreement that is not binding solely because the Government representative who made it lacked the authority to enter into that agreement on behalf of the Government.

(b) *Policy.* (1) Agencies should take positive action to preclude, to the maximum extent possible, the need for ratification actions. Although procedures are provided in this section for use in those cases where ratification of an unauthorized commitment is necessary, these procedures may not be

used in a manner that encourages such commitments being made by Government personnel.

(2) Subject to the limitations in paragraph (c) of this subsection, the head of the contracting activity, unless a high level official is designated by the agency, may ratify an unauthorized commitment.

(3) The ratification authority in subparagraph (b)(2) of this subsection may be delegated in accordance with agency procedures, but in no case shall the authority be delegated below the level of chief of the contracting office.

(4) Agencies should process unauthorized commitments using the ratification authority of this subsection instead of referring such actions to the General Accounting Office for resolution. (See 1.602-3(d).)

(5) Unauthorized commitments that would involve claims subject to resolution under the Contract Disputes Act of 1978 should be processed in accordance with Subpart 33.2, Disputes and Appeals.

(c) *Limitations*. The authority in subparagraph (b)(2) of this subsection may be exercised only when —

(1) Supplies or services have been provided to and accepted by the Government, or the Government otherwise has obtained or will obtain a benefit resulting from performance of the unauthorized commitment;

(2) The ratifying official could have granted authority to enter or could have entered into a contractual commitment at the time it was made and still has the authority to do so;

(3) The resulting contract would otherwise have been proper if made by an appropriate contracting officer;

(4) The contracting officer reviewing the unauthorized commitment determines the price to be fair and reasonable;

(5) The contracting officer recommends payment and legal counsel concurs in the recommendation, unless agency procedures expressly do not require such concurrence;

(6) Funds are available and were available at the time the unauthorized commitment was made; and

(7) The ratification is in accordance with any other limitations prescribed under agency procedures.

(d) *Nonratifiable commitments*. Cases that are not ratifiable under this subsection may be subject to resolution as recommended by the General Accounting Office under its claim procedure (GAO Policy and Procedures Manual for Guidance of Federal Agencies, Title 4, Chapter 2), or as authorized by FAR part 50. Legal advice should be obtained in these cases. [FAC 84-33, 53 FR 3689, 2/8/88, effective 2/22/88]

PART 2 – DEFINITIONS OF WORDS AND TERMS

2.000 Scope of part.

This part defines words and terms commonly used in this regulation. Other terms are defined in the part or subpart with which they are particularly associated (see the Index for locations).

SUBPART 2.1 - DEFINITIONS

2.101 Definitions.

As used throughout this regulation, the following words and terms are used as defined in this subpart unless (a) the context in which they are used clearly requires a different mean-

ing or (b) a different definition is prescribed for a particular part or portion of a part.

* * *

"Contracting officer" means a person with the authority to enter into, administer, and/or terminate contracts and make related determinations and findings. The term includes certain authorized representatives of the contracting officer acting within the limits of their authority as delegated by the contracting officer. "Administrative contracting officer (ACO)" refers to a contracting officer who is administering contracts. "termination contracting officer (TCO)" refers to a contracting officer who is settling terminated contracts. A single contracting officer may be responsible for duties in any or all of these areas. Reference in this regulation to administrative contracting officer or termination contracting officer does not (a) require that a duty be performed at a particular office or activity or (b) restrict in any way a contracting officer in the performance of any duty properly assigned.

(2)

No. 92-904

Supreme Court, U.S.
FILED
DEC 23 1992
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

CHARLES I. MCCOY AND SEAVAC INTERNATIONAL, INC.—U.S.A.
Petitioners,

v.

SEAWARD MARINE SERVICES, INC.
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF IN OPPOSITION FOR RESPONDENT

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether the district court and court of appeals correctly held that judgment as a matter of law was proper on the plaintiffs' claim that there had been a violation of the False Claims Act in Seaward's interpretation of its contracts with the United States Navy ("Navy") and claims made thereunder where:

a. the Navy personnel responsible for drafting, interpreting, and administering the contract testified, without contradiction, that the allegedly false claims were not false, but complied with both the letter and spirit of the contract;

b. the plaintiffs failed to produce any evidence that either party to the contract intended or understood the contract to operate or be construed in accordance with the plaintiffs' interpretation; and

c. the plaintiffs failed to produce any evidence that any claim was filed with the requisite knowledge that it was false.

2. Whether the district court and the court of appeals applied the correct standard in determining that judgment as a matter of law was appropriate when it explicitly recognized and applied the standard established by this Court in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

ADDITIONAL PARTIES HAVING AN INTEREST IN THE PROCEEDING

In addition to the disclosures contained in the Petition at ii, postjudgment discovery revealed that other parties (although not parties below) are directly interested in the outcome of this petition. The petitioners' costs below were paid by Marine Construction and Design, Inc. ("Marco"), which agreed with petitioner Seavac International, Inc.-USA that Marco would direct the appeal of this case and be reimbursed through any recovery.

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BRIEF IN OPPOSITION FOR RESPONDENT

STATEMENT

The unpublished opinion of the district court and the unpublished *per curiam* opinion of the court of appeals demonstrate that this case was decided in both courts upon the unique factual circumstances in which the case arose. Because the petitioners misstate the factual record, this statement of the case is provided.

Seaward Marine Services, Inc. ("Seaward") has provided specialized underwater ship husbandry and maintenance, nondestructive testing and diving services to the Navy since 1979. Pet. App. 3a. At issue in this case are contracts awarded to Seaward in 1984 and 1989 ("the contracts") to clean the underwater hulls of Navy ships, clean and polish propellers, and perform related underwater ship husbandry tasks as assigned by the Navy. *Id.* The petitioner, Seavac International, Inc.-USA competed

unsuccesfully for the 1989 contract and commenced this action after losing the competition.[1]

Although Seaward provides its services on a worldwide basis, a majority of the tasks are performed on ships in ports in the continental United States. The contracts required Seaward to assure that the necessary divers, crew and equipment were available where and when needed and that Seaward be capable of conducting simultaneous operations at four different locations in each of the two zones established by the contract. JAV 1384. At issue in this petition are the services performed in the East Coast zone covering the North and South Atlantic, the Gulf of Mexico, the European coast, the Mediterranean Sea and the Red Sea.[2]

The contracts obligated Seaward to establish and maintain a base office in Norfolk, Virginia from which all of the East Coast work was directed. Pet. App. 3a. When the Navy requested that work be performed on ships berthed at other ports in the East Coast zone, Seaward arranged for a seven or eight man crew and the required machinery, cranes, tools, diving gear and related supplies to travel to these "remote work sites."

The plaintiffs alleged that Seaward violated the contract by charging the Navy for per diem payments in two circumstances. First, the contracts provided for the payment of per diem for work performed outside Norfolk as follows:

> The Contractor will also be reimbursed for the reasonable and actual subsistence costs (including lodging) incurred after arrival at and prior to departure

---

[1] The other petitioner, Charles I. McCoy, is a terminated former employee of the respondent Seaward and now a paid consultant to Seavac. Pet. App. 2a n.1.

[2] The West Coast zone had a base office in San Diego, California and included the North and South Pacific, the Indian Ocean and the Persian Gulf.

> from a CONUS [Continental United States] remote work site . . . The limitations applicable to subsistence will be in accordance with the Joint Travel Regulations ("JTR") for Department of Defense civilian employees.

Pet. App. 4a.

Seaward's standard practice was to pay a mobile crew diver a flat per diem for each day spent at a remote work site outside of Norfolk regardless of where the individual diver chose to live. The per diem amount varied for each location in accordance with the limitations on daily rates established by the Joint Travel Regulations for Department of Defense Civilian Employees. Pet. App. 4a. According to the plaintiffs, billing the Navy for per diem reimbursement for a mobile crew diver who resided near a remote site where work was being performed was a false claim. Pet. App. 3a.

Second, the contracts established a fixed amount per mile to reimburse Seaward for mobilizing to any remote work site outside Norfolk or demobilizing from a remote site back to Norfolk ("mob/demob"). This per mile fee was "to move the equipment and crew(s) to and from work locations (outside of the normal base of operations) . . . ." Pet. App. 4a. The contract barred the payment of per diem for work performed in Norfolk, and further provided that the contractor "may not incur costs under Line Item 0015 [mob/demob] and Line Item 0018 [subsistence] simultaneously." Pet. App. 16a-17a.

Because the mob/demob fee applied only while the crew was "in transit," Seaward routinely billed the Navy for per diem on the same day that its crew traveled, because the crew was present at the remote site for part of the day and in transit (mob/demob) during part of the day. Pet. App. 5a. Thus, if a mobile crew completed its work in New London, Connecticut on Wednesday, and moved to its next assignment in Newport, Rhode Island (55 miles) on Thursday, Seaward would bill per diem on

Wednesday, mobilization during the travel, and per diem on Thursday once the crew reached Newport. The only time that per diem and mob/demob would not be billed on the same day was when the crew was required to spend the night traveling between work sites or when the crew demobilized from a remote work site to Norfolk, where no per diem payments were permissible.

The Navy was fully aware of the manner in which Seaward paid and billed per diem and mob/demob expenses. The amount of per diem and mob/demob related to each job was recorded on the Navy's Cost Summary Report form which was signed by two representatives of the Navy and a representative of Seaward, and was the basis for Seaward's request for payment. JAXIII 4478.

The entire basis of the plaintiffs' false claim complaint was a construction of the contract different from the construction shared by Seaward and the Navy. According to the plaintiffs the prohibition against billing mob/demob and subsistence "simultaneously" meant that the two items could not be billed on the same day. Pet. App. 5a. They also argued that the contract's reference to the "limitations" in the JTR did more than establish the maximum dollar amount of per diem for each city and somehow incorporated all other substantive provisions of the JTR. Pet. App. 5a. Thus, according to the plaintiffs' theory, any invoice reflecting Seaward's cost of paying per diem to a mobile crew diver having an address in the area where work was being performed was claimed to be fraudulent.

At trial only two witnesses from the Navy with any responsibility for the management and administration of Seaward's hull cleaning contracts testified. The first, the contracting officer, John Vollmer, was called by the plaintiffs. He did not testify that the plaintiffs' construction of the contract was correct, or that mob/demob could not be paid on the same day or that it was improper to pay per diem to divers who lived near a remote work station.

He did not suggest that any request for reimbursement was improper, much less fraudulent. Pet. App. 6a. He further testified that even after the plaintiffs' allegations were made public he had approved the Navy's exercise of an option for another year of Seaward's services and would not have done so unless he believed that Seaward was a "responsible" contractor. (JAII 555)

Mr. Vollmer described Michael Dean, whom the petitioners seek to denigrate (*see, e.g.*, Pet. 5, "civilian project manager," "lacked authority," "interpretations at trial were his own"), as the "hull cleaning czar" (JAII 604), and the "Navy official responsible for overseeing the contract" and for "making sure that the contract is performed properly." (Pet. App. 6a; JAII 603-604.) Mr. Vollmer relied upon Dean to initiate any changes to the contract that might become necessary. (JAII 555)

Michael Dean was called by Seaward. As manager of the Navy's hull cleaning program, and later as the head of the Navy's Underwarter Ship Husbandry Division, he was "involved in all aspects of the hull cleaning program from setting policy, defining the program's goals, objectives, requirements, outlining to the fleet how these requirements should be carried out." (JAIII 1068-69) Mr. Dean was personally responsible for "interpreting the [1984] contract, providing guidance to the contractor, overseeing the contractors' operations" and "wrote [the 1989] contract, and, as the program manager, was responsible for the management of [it]." (JAIII 1070-72)

Mr. Dean unequivocally testified that the billing practices about which the plaintiffs (but not the Navy) complained were fully consistent with the contract he wrote and managed. He testified that he was aware that "Seaward's policy is to pay each diver a flat rate of subsistence" and that the residence of any individual performing work outside of Norfolk didn't matter because "all work performed outside of Norfolk is considered a remote

site and is therefore subject to subsistence cost." (JAIII 1068-69; Pet. App. 6a). Indeed, he described the payment of per diem to a diver who maintained a residence near one of the remote sites as

> a perfectly legitimate requirement. If the work is performed at a remote location outside the Norfolk area, *the Navy understands that we will be billed for subsistence cost regardless of how that individual chooses to live while he is there doing work for the Navy.* (JAIII 1091; Pet. App. 6a). (Emphasis added.)

Dean was equally unequivocal in rejecting the plaintiffs' construction of the contract's provisions concerning the payment of mob/demob and per diem on the same day, testifying that there was no prohibition against billing both on the same day because "provided the contractor gets from one location to the second location in the same day, he may bill, he may very well seek charges for both subsistence and mobilization." (JAIII 1092; Pet. App. 6a). Finally, he testified that after the plaintiffs had complained, he had reviewed Seaward's practices and concluded that "there are no problems;" and did not request Seaward to change its billing practices. (JAIII 1094)

After the jury's verdict, the district court straightforwardly applied the requirements of the False Claims Act, 31 U.S.C. § 3729(a) and (b) to this proof in ruling on Seaward's motion for judgment as a matter of law. The district court determined that the word "simultaneously" in the prohibition against incurring mob/demob and per diem "simultaneously" did not mean "on the same day" and, in any event, the clear testimony of both parties to the contract was that charges on the same day for mob/demob and per diem were permissible under the contract. Pet. App. 6a. Similarly, the district court held that both parties to the contract had agreed and understood that the only applicable provision of the JTR's was the limitation on the maximum dollar amount, so that the

residence of a diver was irrelevant. Pet. App. 7a. Accordingly, the district court granted judgment as a matter of law, and, in the exercise of its discretion, conditionally granted a new trial.

The court of appeals affirmed. Recognizing that the appropriate standard to be applied to the grant of a motion for judgment as a matter of law was the now familiar standard of *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), the court of appeals focussed on the requirement that a *qui tam* plaintiff prove that the defendant "*knowingly* presented . . . a false or fraudulent claim. . . ." Pet. App. 7a-8a. Holding that it would be "unthinkable" that a contractor's billings which were consistent with the government's and the contractor's interpretation of the contract could be a false claim the court of appeals held that the plaintiffs had failed to prove the essential element of "knowingly" submitting a false claim. Pet. App. 8a. After considering the same evidence and arguments petitioners repeat here, the court of appeals rejected their arguments that a snippet of testimony misleadingly taken from context revealed a conflict in the testimony of Seaward's president, Pet. App. 9a n.5, and that a single conversation by one supervisor with a single diver represented Seaward's "true" interpretation of the contract. Pet. App. 9a n.5. The court of appeals also rejected the argument that the jury could base a finding on a summary exhibit which "summarized" facts different from the testimony of the witness who made the original entries being summarized and who was the only witness that testified as to the meaning of those facts. Pet. App. 9a nn.5-6. Accordingly, the court of appeals affirmed.

REASONS FOR DENYING THE WRIT

I. THE COURT OF APPEALS' UNPUBLISHED, *PER CURIAM* OPINION IS DEPENDENT UPON A UNIQUE SET OF FACTS THAT ARE EXTREMELY UNLIKELY TO REOCCUR.

The decision of the court of appeals is both *per curiam* and unpublished, factors which suggest the lack of importance of the case to anyone other than the parties. Because the court of appeals' decision is unpublished (Pet. App. 1a), it is not even binding precedent within the Fourth Circuit. *See* Internal Operating Procedures of the United States Court of Appeals for the Fourth Circuit 36.5 and 36.6 (absent unusual circumstances the Fourth Circuit "will not cite an unpublished disposition in any of its published opinions or dispositions," and citation in briefs or oral argument "is disfavored.") Accordingly, the likelihood that the court of appeals' decision will influence the decision of any future case in the Fourth Circuit, much less any other circuit, is extremely remote.

Moreover, the factual circumstances in which this case arose are so unique as to virtually guarantee that the issues presented and quite correctly decided by this case will never reoccur. Rarely—and for good reason—will a disappointed bidder for a government contract, even a well financed bidder, pursue and attempt to litigate an interpretation of a contract that is shared *neither* by the government *nor* the contractor. Moreover, it is extraordinarily unlikely that any future False Claims Act case will have the government officials responsible for writing, interpreting, and managing the contract testify, as Messrs. Dean and Vollmer did here, that the contractor's interpretation of the contract was not only not fraudulent but was the *correct* one. Accordingly, it is not surprising that the petitioners have failed to identify any False Claims Act decision which even arguably employs a different substantive standard than was applied here. None exists nor is ever likely.

II. THE COURT OF APPEALS ESTABLISHED NO NEW OR INCORRECT SUBSTANTIVE OR PROCEDURAL STANDARD.

A. The Court Of Appeals Neither Created Nor Misapplied A "Doctrine Of Practical Interpretation."

The petitioners' assertion that the court of appeals' decision "extends to Federal contract law the equitable doctrine that courts should not disturb the 'practical interpretation' of the parties to a contract," (Pet. 9) underscores petitioners' refusal to understand the issue which was litigated in this *qui tam* case. As the district court and the court of appeals both recognized, Pet. App. 7a-9a, the proper issue was not an abstract interpretation of the contract, or even how the contract would be interpreted if one of the parties to the contract asserted the construction the petitioners asserted. Instead, the issue was whether, in light of the fact that both Seaward and the government interpreted the clauses at issue in the same way, the petitioners had proved the essential element that Seaward had "knowingly" filed a false or fraudulent claim for payment by the government. Pet. App. 7a.

The district court and the court of appeals made clear that each had used Dean's testimony and the parties' consistent course of dealing as evidence of the correct interpretation of the contractual provisions which underscored the plaintiffs' failure to prove that Seaward knowingly filed a false claim. By citing *Management Systems Associates, Inc. v. McDonnell Douglas Corp.*, 762 F.2d 1161 (4th Cir. 1985) (Pet. App. 8a, 19a) both courts did no more than recognize the unremarkable proposition that the "practical interpretation" by the parties of a contract provision of assertedly doubtful meaning ordinarily provides "great, if not controlling, influence" in construing its meaning. There is neither a conflict among the circuits nor a suggestion by any commentator that it is inappropriate to look to the manner in which the parties conducted themselves in determining the meaning of an assertedly

ambiguous provision. Indeed, this Court's recognition of that common sense proposition in *Old Colony Trust Co. v. City of Omaha*, 230 U.S. 100 (1913), has been applied in such diverse contexts as the Uniform Commercial Code § 2-208 (". . . any course of performance accepted or acquiesced in without objection shall be relevant to determine the meaning of the agreement"), and in court of claims decisions interpreting contested contractual provisions. *See Central Engineering & Construction Co. v. United States*, 59 F. Supp. 553, 565 (Ct. Cl. 1945) ("The interpretation of a contract by the parties to it before it becomes the subject of controversy is deemed by the courts to be of great, if not controlling, weight.").

B. The Courts Below Never Purported To Estop The Government.

Relying upon a wildly inapposite melange of cases, the petitioners seek to suggest that the courts below somehow estopped the government in circumstances where other circuits would not. They are wrong for three reasons. First, the court of appeals *never* purported to estop the government [3]—indeed there was no opportunity to do so because the government was neither a participant in the suit *nor* did it try to assert a position at trial any different from its consistent earlier position that Seaward's billings were completely appropriate. Second, Michael Dean, the person who the petitioners claim created the

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[3] The district court correctly recognized that "[w]hile the [False Claims] Act is civil in name, it is punitive in nature." Pet. App. 19a. Granting a private claimant the ability to impose crippling, punitive sanctions because the private claimant believes a governmental official has erred in his or her interpretation of a contract is substantially different from permitting the government to avoid being estopped in an attempt to recover funds that should never have been paid to the defendant in the first place. Nonetheless, the petitioners' suggest that the same rules should apply in this *qui tam* case as in a contract dispute and that the "result herein should not differ simply because the action is prosecuted by *qui tam* relators on behalf of the Government [sic]." Pet. 12.

alleged estoppel without authority, was not only acting within his authority, he was the "hull cleaning czar," the person who wrote the 1989 contract, was responsible for the management of it, and provided guidance to the contractor. JAIII 1070-72. Moreover, Mr. Dean expressed a view of the contract consistent with the contracting officer (Vollmer) who the petitioners concede could bind the government. Thus, Seavac's reliance on cases where the government officer lacked authority, *Heckler v. Community Health Services, Inc.*, 467 U.S. 51 (1984); *Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380 (1947); *United States v. Killough*, 848 F.2d 1523 (11th Cir. 1988); *Strauch v. United States*, 637 F.2d 477 (7th Cir. 1980); *Bornstein v. United States*, 345 F.2d 558 (Ct. Cl. 1965), is wholly misplaced. This is not a case where Seaward erred in relying on an official clearly lacking authority, or in which the person petitioners claim should have been consulted had a different understanding. Third, because the courts below never considered the issue of whether the government should be estopped, it is not possible to compare the court of appeals' reasoning with that of other courts.

III. THE COURT OF APPEALS APPLIED THE CORRECT STANDARD IN REVIEWING THE DISTRICT COURT'S DECISION AND THERE IS NO CONFLICT AMONG THE CIRCUITS REGARDING APPELLATE REVIEW OF A JUDGMENT AS A MATTER OF LAW.

The court of appeals specifically recognized that the standard for granting judgment as a matter of law was the standard expressed by this Court in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986):

> The standard for granting a judgment as a matter of law is essentially the same standard as that used for granting summary judgment. In discussing the relevant inquiry on motion for summary judgment and motion for directed verdict, the Supreme Court stated: 'the primary difference between the two

> motions is procedural . . . In essence, though, the inquiry under each is the same; whether the evidence presents sufficient disagreement to require submission to a jury or whether it is so one sided that one party must prevail as a matter of law.' [*Anderson*] *v. Liberty Lobby, Inc.*, 477 U.S. 242, 251 (1986)." Pet. App. 7a.

The court of appeals' application of *Anderson* was straightforward. In an effort to manufacture an issue, Seavac asserts that the court of appeals adopted a unique approach to reviewing a grant of judgment as a matter of law that conflicts with other circuits. Seavac tortures this argument from a portion of a sentence in footnote 5 to the panel's opinion, which in full reads:

> We agree with the district court, however, that a *comprehensive reading* of Armstrong's testimony allows only one construction, *i.e.*, that Armstrong interpreted the Contracts to permit same day charges and per diem reimbursement for divers residing near the remote site." Pet. App. 9a n.5 (emphasis added).

The court of appeals' reference to a "comprehensive reading" is unquestionably a reference to the fact that it was reading the entire exchange between Seaward's president and plaintiffs' counsel—not the exchange which plaintiffs misleadingly sought to create by editing it.[4] By

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[4] The full exchange involving the billing of mob/demob and *per diem* on the same day was:

> Q. Didn't Mr. Dean agree with your opinion or your policy at Seaward that it would be improper for Seaward to bill the government for demobilization charges on the same day that per diem charges were being billed and incurred?
>
> A. Yes.
>
> Q. And isn't that in fact the policy of Seaward?
>
> A. What?
>
> Q. Not to bill per diem and demobilization charges on the same day?
>
> A. Yes.
>
> Q. *Isn't that not only the policy of Seaward, but also Seaward's contract interpretation?*

[Continued]

taking the "comprehensive reading" language out of context, petitioners erroneously seek to suggest that the panel's reasonable and customary requirement that an answer of a witness must be read in context constitutes an improper *weighing* of the evidence in the case. *Cf. Anderson, supra*, 477 U.S. at 255. The court of appeals undertook no weighing or credibility determination—it simply and properly required that a witness' entire answer be read. *Anderson* establishes that the inquiry is "whether *the evidence* presents sufficient disagreement to require submission to a jury or whether it is so one sided that one party must prevail as a matter of law." 477 U.S. at 251 (emphasis added). There was no such disagreement. Indeed, as both lower courts found, the evidence was so one-sided that the defendants were entitled to prevail as a matter of law. The court of appeals' requirement that the testimony be read fairly—or "comprehensively" in the sense that it not be misleading excerpted—did no more than prevent the plaintiffs from arguing that the verdict was supported by a piece of evidence that did not exist.

Finally, Seavac's argument that there are conflicts among the circuits regarding the standard of appellate review from a judgment as a matter of law is not only irrelevant to the determination of this case but wrong. Surely, no conflict exists with the court of appeals' re-

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[4] [Continued]

A. *I think—did you just say the policy not to bill demob to Norfolk and subsistence on the same day?*

Q. *Correct. Isn't that the policy?*

A. *That's the policy, yes.*

Q. Isn't that also Seaward's contract interpretation of the hull cleaning contract?

A. Yes. (JAII 733-34; emphasis added.)

In the district court the petitioners misleadingly omitted the underscored language. Pet. App. 21a. The underscored language was critical because it made clear that the answer was in the context of a return to Norfolk where *per diem* was not permitted.

quirement that testimony be fairly read. After *Anderson*, there appears to be no *substantive* split among the other circuits.[5]

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Dated: December 23, 1992

[5] Most of the cases upon which petitioners rely precede *Anderson*. Pet. 16-19 nn.8-24. None suggest that any different formulation of the standard would have influenced the outcome.